

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDDY L. MAY

Claimant

VS.

SEDGWICK COUNTY

Respondent

Self-Insured

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Docket No. 210,400

ORDER

Respondent appeals Administrative Law Judge Jon L. Frobish's January 4, 2001, Award. On June 8, 2001, the Appeals Board heard oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, David M. Bryan, Jr. of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

As a result of a November 16, 1995, work-related accident, the Administrative Law Judge (ALJ) found claimant sustained a laceration to the forehead, a fractured skull, a twisted right knee, and a low back injury. Based on the residual effects from three failed back surgeries, the ALJ found claimant was completely and permanently incapable of engaging in substantial and gainful employment. Accordingly, the ALJ concluded the claimant was permanently and totally disabled and awarded claimant \$125,000, the statutory maximum award, for permanent total disability.

On appeal, the respondent, at oral argument, agreed that claimant had sustained serious permanent injuries as a result of the November 16, 1995, accident. In fact, the respondent stipulated that a result of those injuries, claimant was entitled to \$100,000, the statutory maximum award, for permanent partial general disability. The respondent contends the more persuasive evidence contained in the record presented through the

opinions of physical medicine and rehabilitation physician Philip R. Mills, M.D. and vocational expert Karen Crist Terrill proves that claimant retains the ability to perform substantial and gainful employment. Thus, the respondent argues claimant is not permanently and totally disabled and claimant's award should be limited to permanent partial general disability benefits in the amount of \$100,000.

In contrast, claimant contends he proved through his testimony and the persuasive opinions of his treating physician, orthopedic surgeon Anthony G. A. Pollock, M.D., physical medicine and physical rehabilitation physician Pedro A. Murati, M.D. and vocational expert Jerry L. Hardin, that as a result of the serious injuries sustained in the November 16, 1995, work-related accident, claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Therefore, the claimant requests the Appeal Board (Board) to affirm the ALJ's permanent total Award of \$125,000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

On November 16, 1995, claimant was employed by Sedgwick County as a deputy sheriff. On that evening after dark, claimant was pursuing on foot a suspected burglar. During the pursuit, claimant climbed an eight foot fence onto the roof of a metal shed. When claimant jumped from the roof of the shed to the ground his forehead hit a metal T-post. As a result of that fall, claimant sustained a laceration to his forehead, a skull fracture, a twisted right knee and a low back injury.

Respondent first provided emergency medical treatment for claimant's injuries at a local hospital. Claimant was then referred to Jerome E. French, M.D. for treatment of a displaced fracture of the anterior wall of the frontal sinus. On March 18, 1996, Dr. French operated on claimant to repair this displaced fracture and other sinus and nasal related abnormalities caused by the traumatic accident. This surgery was successful and claimant has made a good recovery from the nasal and sinus injury.

After the accident, claimant also had low back symptoms. Claimant thought those symptoms would resolve and his primary concern was the sinus and nasal problems. But the low back symptoms persisted.

On February 26, 1996, claimant was referred to and was first seen by Dr. Pollock. At that time, claimant had complaints of pain in the low back and pain in the right leg. Dr. Pollock diagnosed claimant with a Grade I spondylolisthesis with degenerative disc disease aggravated by the fall.

On June 17, 1996, Dr. Pollock performed the first of three surgeries on claimant's low back. The first surgery was a fusion of the L5-S1 region of the lumbar spine. The second surgery occurred on February 24, 1997, with Dr. Pollock performing an instrumented L4-S1 fusion using an allograft bone. The third surgery was performed on December 31, 1997. At that time, Dr. Pollack performed an L4-S1 refusion grafting cancellous and crushed bone chips along with using a spinal stimulator. All three fusion surgeries failed.

The last time Dr. Pollack saw claimant was June 22, 1999, when he found a defect in the bone mass, a fracture of one of the pedicle screws and the fusion not solid. Dr. Pollock has recommended a fourth fusion procedure but testified that it was possible claimant's pain would not improve even if a solid fusion was obtained.

At the September 19, 2000, regular hearing, claimant testified he was in constant pain at a four or five level or sometimes a nine or ten level if the pain was measured between zero and ten. Because of the pain, claimant has to alternately sit, stand and walk. Almost any activity causes him increased pain. Specifically, if claimant attempts to do anything with his hands out in front of him this causes tension in his low back and increased pain. Claimant answered "No" when asked if he could work an eight hour day. In an attempt to control the pain, claimant continues to take both prescription and over-the-counter pain medication on a daily basis.

During Dr. Pollock's testimony, he was asked, what was his opinion on claimant's ability to engage in any substantial gainful employment? Dr. Pollock replied, "I believe he [claimant] is permanently and totally disabled from any gainful employment and is certainly incapable of returning to his normal, regular employment." Later in Dr. Pollock's testimony, he clarified the restrictions he had imposed on claimant's work activities were no bending, twisting or lifting. Also, claimant should not sit for more than 30 minutes or stand for more than one hour. The doctor further testified, "I don't think that this man [claimant] is going to realistically be employable because of all those limitations placed on him."

At his attorney's request, claimant was examined and evaluated by Dr. Murati on June 7, 2000. After taking a history from the claimant and performing a physical examination, Dr. Murati's diagnostic impression was low back pain status post L4-S1 fusion. Dr. Murati opined, based on his examination of claimant, that claimant was essentially and realistically unemployable. Dr. Murati further opined, if claimant was employed, then claimant needed a job where he could lie down during the day because claimant cannot sustain any position for more than 30 minutes at one time.

Claimant was also interviewed at his attorney's request, by vocational expert Jerry D. Hardin. Based on the restrictions imposed by both Dr. Pollock and Dr. Murati, Mr.

Hardin concluded that he did not know of any companies in the open labor market that he could place claimant.

An injured worker is entitled to permanent total disability benefits in the amount of the statutory maximum of \$125,000,¹ if, on account of the injury, the injured worker is "completely and permanently incapable of engaging in any type of substantial and gainful employment."² Expert medical testimony that establishes that the injured worker is essentially and realistically unemployable is compatible with the statutory definition of permanent total disability.³

Based on claimant's testimony and the opinions of Dr. Pollock, Dr. Murati, and vocational expert Jerry D. Hardin, the ALJ found claimant was permanently and totally disabled. The Board agrees. As a direct result of claimant's November 16, 1995 work-related accident, claimant had three failed back surgeries leaving claimant with debilitating pain and discomfort in his low back and lower extremities. Claimant's treating physician, Dr. Pollock, has restricted claimant from any activity requiring him to bend, twist or lift. Also, claimant cannot sit over 30 minutes at any one interval and cannot stand for more than one hour. Moreover, Dr. Murati opined that claimant's current condition would require him to lie down during the day on any job he attempted. Both Dr. Pollock and Dr. Murati determined that as a result of claimant's low back injury and failed back surgeries, he was unemployable. Vocational expert, Jerry D. Hardin, concluded that he could not place claimant in a job based on Dr. Pollock's and Dr. Murati's restrictions. Mr. Hardin also opined that claimant was unemployable.

The Board acknowledges that respondent employed Dr. Philip R. Mills to examine and evaluate the claimant. Although Dr. Mills agreed claimant had severe pain and a poor prognosis, Dr. Mills, nevertheless, determined that claimant could do sedentary work if he could change position on as needed basis. Vocational expert, Karen Crist Terrill, interviewed claimant at respondent's request. Based on Dr. Mills' opinion the claimant could perform sedentary employment, she determined there were jobs available in the open labor market that claimant could perform and earn in the range of \$7.00 to \$14.00 per hour.

¹ See K.S.A. 44-510f(a)(1) (1993 Furse).

² See K.S.A. 44-510c(a)(2) (1993 Furse).

³ See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 113, 872 P. 2d 299 (1993).

The Board concludes, based on the totality of the record, the greater weight of the evidence establishes that the severe injuries claimant sustained while working for the respondent have rendered him, as a practical matter, unemployable and entitled to permanent total disability benefits.

AWARD

WHEREFORE, it is the decision, and order of the Board that ALJ Jon L. Frobish's January 4, 2001, Award, should be, and is hereby, affirmed and an Award is granted in favor of the claimant, Eddy L. May, and against the respondent, Sedgwick County, a qualified self-insured, for an accidental injury sustained on November 16, 1995, for a permanent and total disability.

Claimant is entitled to 157.29 weeks of temporary total disability compensation at the rate of \$326 per week or \$51,276.54, followed by the payment at the rate of \$360 per week not to exceed a total award of \$125,000 for a permanent total disability.

As of June 25, 2001, there is due and owing claimant 157.29 weeks of temporary total disability compensation at the rate of \$326 per week or \$51,276.54, followed by 135.14 weeks of permanent total disability compensation at the rate of \$326 per week or \$44,055.64 for a total of \$95,332.18, which is ordered paid in one lump sum less any amounts previously paid.⁴ The remaining balance of \$29,667.82 is to be paid for 91 weeks at the rate of \$326, until fully paid or further order of the Director.

All authorized medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of June 2001.

⁴ The ALJ's Award indicated that as of January 5, 2001, the total Award of \$125,000 was all due and owing. This was an error as the total Award of \$125,000 would not be fully paid from claimant's November 16, 1995, accident date until March 24, 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David M. Bryan, Wichita, Ks.
E. L. Lee Kinch, Wichita, Ks
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director